In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-923

MICHAEL FERRARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court below used an erroneous standard to determine whether there was sufficient independent evidence of petitioner's participation in a conspiracy to allow admission of hearsay declarations.

Following a jury trial in the United States District Court for the District of New Jersey, petitioner and co-defendant Richard Sanducci were convicted of conspiracy to steal and unlawfully remove goods moving in interstate and foreign commerce, in violation of 18 U.S.C. 371; unlawful possession of goods stolen while moving in interstate and foreign commerce, in violation of 18 U.S.C. 659; and unlawful removal of goods from the control of customs officers, in violation of 18 U.S.C. 549. Petitioner was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed (Pet. App. 5a-7a).

1. The indictment charged petitioner and five co-defendants[1] with conspiracy and substantive offenses arising out of the theft from a United States Customs area at Port Elizabeth, New Jersey, of a United States Lines container filled with color television sets. The evidence revealed that co-defendants Buscemi and Saraceno asked Louis Gonzalez[2] to drive a load of television sets from a diner in Port Elizabeth to a designated "drop" in return for $1,000 (7 Tr. 32-33). On the evening of February 22, 1972, Gonzalez accompanied Buscemi and Saraceno to the Lamppost Lounge to meet co-defendant Sanducci, who was to bring the television sets over to the diner (7 Tr. 34, 35-36). Sanducci told Gonzalez that he would use his own tractor to get the sets out of the United States Lines' container (7 Tr. 36).

During the meeting, one of the participants made a phone call (7 Tr. 37-38). Prior to the call, the participants said "they were going to call Mickey [sic] to verify with him to see if everything was all right for the next day." They told Gonzalez that "Mickey [sic] [was] the delivery clerk at the U. S. Lines" (7 Tr. 38-41). On the day of the theft, Sanducci arrived at the diner with the container in a trailer; Gonzalez drove the trailer to a garage in Staten Island, where the sets were unloaded and Gonzalez was paid (7 Tr. 46-58).

---

[1]Prior to trial co-defendants Frank Buscemi, Alfred Saraceno, and Anthony DeFalco pleaded guilty to reduced charges. Co-defendant Michael Weinberg was acquitted on all counts.

[2]Gonzalez was an unindicted co-conspirator who agreed to testify as a government witness in exchange for a promise that he would not be prosecuted (7 Tr. 16). Transcript references are to volume and page of the trial transcript.

Other testimony showed that petitioner Ferrara was a clerk in the delivery area and that he was the only one named "Mickie" in that area (4 Tr. 116). Evidence showed that on the evening of February 22, 1972, a call was placed from petitioner's home phone to the Lamppost Lounge (8 Tr. 14, 25-45). The director of security for the terminal company testified that petitioner, who was a delivery clerk at the terminal, had processed the gate pass for the vehicle involved in the theft and had issued the tally for the stolen container, even though the driver had never gone to the United States Lines approval clerk for processing (3 Tr. 79-82, 90, 100, 109-110).[3]

At trial, Gonzalez narrated the conversations at the meeting among the conspirators. These included the discussion about the telephone call to "Mickey [sic]," the delivery clerk at the United States Lines (7 Tr. 38-41).[4]

---

[3]Other evidence showed the significance of processing the documents without the clerk's authorization. This delivery order was a special transfer order issued internally by the United States Lines itself to permit delivery from port to port, here Port Elizabeth to Port Toronto. As such, the approval clerk never would have allowed the order to go through. All internal orders are sent by courier directly to the approval clerk, but here the transport trucking firm petitioner alleged was involved was not under contract with United States Lines for transporting from port to port; United States Lines does not ship inland to Toronto; the document involved was missing the date and weight required by law; the signature of the individual required to sign every such transfer order was forged (3 Tr. 92-93, 98-99; 7 Tr. 5-7).

[4]Before the testimony was received, the trial judge instructed the jury that it could not consider hearsay statements unless petitioner's own acts and statements had shown him to be a member of the conspiracy (7 Tr. 39-40). The trial judge repeated this limiting instruction in his final charge (12 Tr. 33).

The court of appeals held that the trial court was entitled to admit Gonzalez's testimony implicating petitioner. It stated that "there was sufficient independent evidence of [petitioner's] participation in the conspiracy for the objected to declarations to be admissible under the co-conspirator exception to the hearsay rule. See *United States* v. *DeLazo*, 497 F.2d 1168 (3d Cir. 1974) (only slight evidence required to connect the defendant with a conspiracy once the existence of the conspiracy is proven)" (Pet. App. 6a, n. 1).

2. Petitioner's sole contention is that the court of appeals employed a "slight evidence" standard in evaluating whether there was sufficient nonhearsay evidence connecting him to the conspiracy to allow the introduction of hearsay evidence against him under the co-conspirator exception to the hearsay rule, and that the "slight evidence" standard conflicts with the "fair preponderance" test enunciated in the leading case of *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028.

Although the language used by the court of appeals in the instant case in explaining its result may not have been carefully chosen, there is no conflict in the standards used by the Second and the Third Circuits in evaluating the quantum of evidence necessary to sustain the admission against an accused of declarations of his alleged co-conspirators, once the existence of a conspiracy has been established by substantial nonhearsay evidence (see *United States* v. *Moraites*, 456 F.2d 435 (C.A. 3)). The Third Circuit has approved and followed the *Geaney* rule. See *United States* v. *Bey*, 437 F.2d 188 (C.A. 3); *United States* v. *DeCavalcante*, 440 F.2d 1264 (C.A. 3). Under this rule, as stated in *Geaney*, *Bey*, and *DeCavalcante*, a "fair preponderance" of the nonhearsay evidence must indicate that an accused is a member of the conspiracy before the district court may allow the jury to consider against him any hearsay declarations by co-conspirators.

By contrast, the "slight evidence" test is addressed to the quantum of evidence, including hearsay evidence, that is required to allow the case to go to the jury. All courts of appeals that have considered the matter have concluded that "slight evidence," in the context of an established conspiracy, may well suffice to demonstrate an accused's complicity beyond a reasonable doubt. *United States* v. *Marrapese*, 486 F.2d 918, 921 (C.A. 2); *United States* v. *DeLazo*, 497 F.2d 1168 (C.A. 3); *United States* v. *Maslanka*, 501 F.2d 208 (C.A. 5); *United States* v. *Mayes*, C.A. 6, No. 73-1988, decided February 25, 1975; *United States* v. *Braasch*, 505 F.2d 139, 148 (C.A. 7) (Mr. Justice Clark); *United States* v. *Hutchinson*, 488 F.2d 484, 490 (C.A. 8), certiorari denied *sub nom. Ennis* v. *United States*, 417 U.S. 915; *United States* v. *Nunez*, 483 F.2d 453, 460 (C.A. 9), certiorari denied, 414 U.S. 1076. On this test, too, there is no conflict.

Petitioner has not contended that the evidence of his complicity in the conspiracy, including hearsay evidence, was insufficient to allow the case to go to the jury; rather, he contends that the nonhearsay evidence of his involvement was inadequate to allow consideration of hearsay declarations. The "slight evidence" test was thus not properly relevant to the issue he raised, and it would have been more accurate for the court of appeals to have adverted to the "fair preponderance" test it had adopted in *Bey* and *DeCavalcante*. However, there is an apparent conflict among the circuits (although not between the Second and Third Circuits) concerning the rule expressed in *Geaney* and *Bey*. Several courts of appeals have held that the nonhearsay evidence of participation in the conspiracy must by itself be sufficient to allow a case to go to the jury before hearsay may be considered against a

defendant.[5] This presumably would mean that the "slight evidence" of involvement must be established entirely by nonhearsay evidence. But we submit that the Court need not resolve this verbal conflict in this case,[6] because under any formulation of the applicable standards the nonhearsay evidence linking petitioner to the conspiracy was adequate both to support the use of hearsay declarations by co-conspirators and to allow the case to go to the jury.

The nonhearsay evidence establishing membership in a conspiracy may be entirely circumstantial. *United States* v. *Cirillo*, 499 F. 2d 872, 883 (C.A. 2). Evidence in this case established that petitioner placed a call to the Lamppost Lounge on the night the other conspirators met there, that petitioner issued a tally for the container and a gate pass allowing the vehicle involved in the theft to leave the terminal (although he had no authority to do either), and that the documents allowing the vehicle to leave had been spuriously filled out and a required signature forged. This was ample circumstantial evidence that petitioner was operating in league with the other conspirators.

---

[5]See *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Oliva*, 497 F.2d 130, 132-133 (C.A. 5); *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8); *Carbo* v. *United States*, 314 F.2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953 (but see *United States* v. *Spanos*, 462 F.2d 1012 (C.A. 9)). Cf. *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 16, n. 14.

[6]It is by no means clear that the difference in standards articulated by the various circuits is actually likely to lead to different results on any given set of facts.

Moreover, the court of appeals held that "many of the declarations testified to by Gonzalez, including the phone call received at the Lamppost Lounge, were not hearsay * * * " (Pet. App 6a, n. 1). Petitioner has not controverted this conclusion. Perhaps the most important evidence against petitioner was the declaration by one conspirator that "they were going to call Mickey [sic]" (7 Tr. 38) to discuss plans for the theft, together with the evidence that petitioner (who is known as "Mickie") called the Lamppost Lounge that night. But this "verbal act" was not hearsay. "Explanatory words which accompany and give character to [a] transaction are not hearsay." McCormick, *Evidence* 589 (1972 ed.). See *United States* v. *Tramunti*, C.A. 2, No. 74-1550, decided March 7, 1975 (slip op. 2143); *United States* v. *Annunziato*, 293 F.2d 373, 377 (C.A. 2). Petitioner points to no evidence properly classified as hearsay that was used against him, and we are aware of none.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.